IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a corporation,

Plaintiffs in Error,

v.

HARRY A. BISHOP, as United States Marshal for the first division of the district of Alaska, and D. N. McDONALD,

Defendants in Error.

No. 2817

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NO. 1.

Plaintiff in Error's Petition for Rehearing

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We ask the court to reconsider its holding in this case, not because there is question concerning the law which has been applied limiting the jurisdiction of this court. Defendants in error have argued the

case on its merits considering the whole matter open for review. Naturally we did not in our briefs attempt to show a thing not disputed. The lower court and counsel for both sides considered there was no question of fact involved, but merely questions of law (rec. p. 176). We submit this is true and in so far as the findings of fact touch the essential controlling issues involved they are unsupported by evidence.

The proofs establish that the officers and stockholders ratified and acquiesced in the execution of the bill of sale (rec. pp. 68, 69, 70, 84, 94, 95, 96, 152, 153, 154); that the company originated the receivership proceedings and they were conducted in its behalf (rec. 66, 83, 92, 151) and that the order pertaining to the transfer was not a necessary or required part of those proceedings, but was suggested by the company and obtained with its cooperation to accomplish its purpose (rec. 70, 73, 76, 87, 95, 96, 99, 154, 155, 201). In short, the receivership proceedings, the order and the transfer were instituted by the company itself and were its voluntary acts from start to finish. These we insist are the decisive controlling facts. All the evidence pertaining to them will be found on the pages referred to and there is no conflict.

Ultimately there are two questions involved, namely: Was the transfer the company's act, and

if so, was it voluntary? The court found "that said corporation has not by any action of its governing board transferred or assigned said property to said Schoenwald and Hills in any capacity, or at all, nor at all ratified or acquiesced in any such assignment or in said receivership proceedings" (finding VIII). Now it is true the record shows and it is not questioned that the governing board of the corporation did not formally act in making the transfer, instituting the receivership and obtaining the order pertaining to the transfer and that it did not by formal action ratify these things. However, formal action is not essential. That the instrument of transfer in this case was in fact executed by officers of the corporation acting in its behalf and that all the company's officers and stockholders ratified and acquiesced in this is established by undisputed evidence. The court found simply that the corporation did not act by one method, but the testimony shows without conflict that it acted by another.

This finding with reference to ratification and acquiescence is ambiguous. It may mean that the company did not by formal action of its governing board ratify the transfer and the receivership, or it may mean that it never in any way ratified or acquiesced. If the former is meant the finding is immaterial, since as we have shown the corporation acted by another method. If the latter is meant the finding is contrary to the undisputed testimony that all

the officers and stockholders did in fact ratify and acquiesce in the transfer and receivership proceedings.

Now as to the second vital question: Was the transfer voluntary? We have disposed of the court's finding that the receivership and transfer were not ratified and acquiesced in by the company. We repeat there is no evidence to support it. The fact that the proceedings were adversary in form does not itself show they were so in fact, and the unquestioned proof that the proceedings were originated by the company and conducted in its behalf is controlling and decisive.

We ask the court to clearly recall our position that the receivership proceedings were voluntary and hence the transfer even had it been a required part of them would have been voluntary. However assume the receivership was involuntary and that there was some evidence to show this, it does not follow that the transfer was involuntary since it was not a requisite part of the receivership. The situation is parallel (except in one respect hereafter shown) to the question whether the corporation in fact acted or not. We showed that although there was evidence to support the finding that the company did not act by one method yet there was none that it did not act at all. The evidence that it acted by another method was not questioned. Here

there is not even evidence to support the court's conclusion that the receivership was involuntary, but even had there been, the uncontradicted evidence shows the transfer was nevertheless voluntary. It was not provided for by any law or statute and it was not therefore required (rec. pp. 73, 99). In fact the record of the proceedings itself shows this. The testimony that the connection between the receivership and the transfer entirely came about through the voluntary action of the Company stands unquestioned. The record in so far as it pertains to the transfer cannot be said to be adversary even in form, for although the order recites that the receivers applied for it, it also recites that the company consented to the order through its president. The court's seventh finding, referring to the transfer, that "said instrument in fact was executed pursuant to the order of the Superior Court of the State of Washington in and for King County" is established by the evidence but the controlling and decisive fact is that the order was not a required part of the receivership proceedings but only became connected with them by virtue of the company's voluntary action. There is no evidence conflicting with this last statement which decisively shows that the transfer was the voluntary act of the company, whether the receivership was or was not an *in invitim* proceeding.

This court indicates in its opinion that had the plaintiff rested upon the record of the receivership proceedings in the Washington court there would have been evidence to support the findings. We do not know whether or not the court concludes from this that since that record is in evidence the findings have some support. We submit that this conclusion does not follow, since the oral evidence introduced was not simply cumulative or conflicting with that of the record, but was a showing that the record itself and everything pertaining to the receivership and transfer was the product of the company's voluntary acts, which is the decisive and controlling feature of the case. In *Mead v. Chesbrough Bldg. Co.*, 151 Fed. (C. C. A. 2d cir.) 998, there was a request by both parties for a directed verdict and it was held they were concluded by the finding of the court in favor of the defendant unless there was no evidence whatever to support the finding. The plaintiff, however, insisted that certain vital and controlling facts were established and the Circuit Court of Appeals held that if this was true and the facts did not admit of any contrary inference the court below erred and should have directed a verdict for the plaintiff and it considered at length whether the controlling facts were established by evidence substantially undisputed (see opinion beginning bottom page 1002). Our case is analogous in principle. The controlling facts are established by undisputed evidence and entitle us to a reversal.

If the court's eighth finding of fact means only that the corporation did not ratify the transfer and the receivership by formal action of its board of directors then, as we have shown, this finding is immaterial. Both the lower court and counsel for defendants in error considered that a corporation could not act except formally through its board of directors and we are certain the finding was intended to mean that the corporation had not so acted in ratifying these transactions. So construing it, it does not support the conclusion of law that the receivership and the assignment were *in invitum,* since as we have shown the fact that the corporation did not freely act in one way does not justify the conclusion that it did not in another. But we wish to urge further that if the finding means this then the court made no finding whether the corporation had freely instituted the receivership proceedings, made the transfer and ratified and acquiesced in these things other than through its governing board. Plaintiff in error requested findings on these points (see requested findings II, III, VI and VII, pp. 205, etc.). The refusal of the court to make findings on these questions is equivalent to holding them immaterial, of which holding we are entitled to a review.

Duncan v. The Francis Wright, 105 U. S. (15 Otto) 381, 26 Law Edition, 1100.

Another case which we ask the court to consider is

World's Columbian Exposition Co. v. Republic of France, 96 Fed. (C. C. A. 7th Cir.) 687.

There the appellate court recognized the principles which this court has applied in the decision as rendered, but nevertheless reviewed the evidence to determine whether it was sufficient to justify a finding for the plaintiff. The court held that plaintiff in error's requesting a conclusion of law was equivalent to asserting the entire evidence was not sufficient to justify a finding for the plaintiff and the court's refusal to adopt this conclusion was a finding against the defendant on this proposition of law, which ruling could be reviewed. Certainly the conclusions of law we asked (rec. p. 209, etc.) are equally susceptible of such construction and the court should so view them and pass upon the question of law as was done in the case just referred to.

We believe an examination of the references to the record above made will reveal what the lower court and counsel for both parties have considered throughout, namely: that there is no conflict in the evidence with respect to the decisive features of this case, and the consideration of the court's findings we have made in the light of the record shows that the findings, in so far as they pertain to controlling questions in the case are unsupported by the evidence.

There is an independent matter which properly does not belong here but we beg the court's consideration. Should the court review the question whether the oral testimony admitted contradicts explains or controls the evidence furnished by the record of the proceedings in the state court, we ask it to keep clearly in view our contention that this question with reference to the receivership proceedings as a whole is entirely independent of the question with respect to the order providing for the transfer. Even should the court find that oral evidence offered for the purpose of showing the receivership proceedings were voluntary is objectionable and therefore hold the receivership proceedings to have been involuntary, nevertheless this is not decisive of the plaintiff in error's right to recover. The order and transfer must be viewed as entirely independent and separate from the receivership proceedings. Th question whether the oral evidence contradicts, explains or controls in any objectionable sense must be asked specifically with reference to the order directing the transfer viewed independently of the rest of the proceedings. Our contention is in this respect that the recitals of the order harmonize with and confirm the testimony that it and the transfer pursuant to it were the result of the free action of the company.

We respectfully submit that the court's findings on essential facts are unsupported by the evidence and that the judgment should be reversed.

WINFIELD R. SMITH, and
WINN & BURTON,
Attorneys for Plaintiffs in Error.

CERTIFICATE.

I, Winfield R. Smith, one of the attorneys for the plaintiffs in error above named, hereby certify that the petition for rehearing herein is in my judgment well founded and it is not interposed for delay.

WINFIELD R. SMITH.